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# Management Services Corp. et al v. Development Associates : Brief of Respondent in Opposition to Appellants' Petition for Rehearing

Utah Supreme Court

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Kent B. Scott; Senior & Senior; Attorney for Respondents;

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IN THE SUPREME COURT OF THE STATE OF UTAH

\* \* \* \* \*

MANAGEMENT SERVICES CORP  
a Utah corporation,

Plaintiff and  
Respondent,

v.

DEVELOPMENT ASSOCIATES, a  
Utah corporation, and JOHN  
and JANE DOES One through  
Eight,

Defendants and  
Appellants.

Case No. 16341

\* \* \* \* \*

BRIEF OF RESPONDENT IN OPPOSITION TO  
APPELLANTS' PETITION FOR REHEARING

\* \* \* \* \*

APPEAL FROM THE JUDGMENT OF THE  
THIRD DISTRICT COURT IN AND FOR SALT LAKE COUNTY  
THE HONORABLE PETER F. LEARY, JUDGE

\* \* \* \* \*

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FILED

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Eight, \*

Defendants and \*  
Appellants. \*

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BRIEF OF RESPONDENT  
IN OPPOSITION TO APPELLANTS' PETITION FOR REHEARING

\* \* \* \* \*

STATEMENT OF THE NATURE OF THE CASE

This action was commenced by plaintiff-respondent,  
MANAGEMENT SERVICES CORPORATION (hereinafter Management  
Services), purchaser, against DEVELOPMENT ASSOCIATES, seller,  
for the breach of a Uniform Real Estate Contract dated December  
7, 1976 (hereinafter the Contract), wherein Development  
Associates agreed to sell to Management Services eight (8)  
improved lots in the Daybreak Phase III Subdivision for a total  
price of \$80,000, calculated at \$10,000 per lot.

DISPOSITION IN LOWER COURT AND SUPREME COURT

At the trial of this matter, the Honorable Peter F. Leary,  
sitting without a jury, held that the Contract was divisible;

that Management Services defaulted with respect to an installment payment of \$19,800 due on March 1, 1977, and thereby forfeited its interest in two of the eight lots specified in the Contract; and that Development Associates wrongfully terminated the Contract with respect to the remaining six lots for payments which were not due until April 1, May 1, and June 1, 1977. Accordingly, on February 1, 1979, the trial court entered judgment in favor of Management Services on its third cause of action for damages for the breach of contract by Development Associates and awarded Management Services \$7,700 in lost profits; \$2,438 in lost commissions; \$600 for the wrongful retention of earnest money; costs of \$159.05; and attorneys' fees of \$1,850, for a total judgment of \$12,747.05 with interest at the rate of eight percent. This Court, in its decision filed September 11, 1980, affirmed the decision of the trial court and remanded the case to the district court for its determination of reasonable attorneys' fees to be granted to Management Services for successfully prevailing on the appeal.

#### RELIEF SOUGHT ON PETITION FOR REHEARING

Management Services respectfully requests that this Court deny the petition for rehearing of this matter sought by Development Associates, and thereby affirm the earlier decision of this Court upholding the judgment of the trial court and remanding this case to the trial court for its determination of

reasonable attorneys' fees incurred by Management Services in prevailing on the appeal.

#### STATEMENT OF MATERIAL FACTS

Management Services does not controvert the assertions contained in the Statement of Material Facts submitted by Development Associates. However, Management Services submits that a complete understanding of the factual situation may not be had without consideration of what follows.

The Uniform Real Estate Contract executed on December 7, 1976 by Development Associates and Management Services was prepared by Development Associates (Record at 134, 288-89). Language in that Contract bearing on the issue of severability includes not only Paragraphs 2 and 3 quoted by Development Associates, but also the following (R. 9):

6. It is understood that there presently exists an obligation against said property in favor of State Savings & Loan and Land Funding, Inc. with an unpaid balance of \$8,600.00 per lot, as of December 1, 1976.

While Mr. Edward A. White, representing Management Services in the negotiations of the Contract, was familiar with real estate transactions generally and with the specific contract form used on this occasion, Development Associates was likewise represented by a man of considerable experience in these real estate matters and forms, Mr. Marvin J. Kirkham (R. 229). Mr. Kirkham graduated from college with a degree in business management, attended one year of law school, worked for several years as a real estate agent, and later as a broker, and had

been involved in between three and four hundred transactions involving Uniform Real Estate Contracts similar to the one here at issue (R. 239-43).

The reason Management Services did not make the payment of \$19,800 due on March 1, 1977, was that it sought, as a precondition to the payment, security from Development Associates that certain improvements on the lots contracted for would be made (R. 13). While the time such improvements were to be made has been disputed by the parties (R. 136, 231, 254-57), both parties clearly understood, as Mr. Kirkham of Development Associates admitted at trial, that these improvements were to be made on the lots at the expense of Development Associates (R. 132-36, 228-32). Moreover, Management Services did offer to pay the overdue monies into escrow (R. 13, 251).

Furthermore, both parties clearly understood that the lots which Management Services had contracted to buy were to be resold by Management Services to other parties (R. 127, 136-37, 256).

The consideration for the eight lots named in the Contract was calculated on the basis of \$10,000 per lot (R. 129). The figure of \$800 paid as a deposit on the Contract was likewise arrived at by calculating \$100 per lot as Mr. Kirkham testified at trial in response to a question of his own attorney (R. 265). Separate warranty deeds were to be issued by Development Associates for each lot as it was paid for (R. 266).



The eight lots named in the Contract were each encumbered by a mortgage debt of \$6,600 in favor of State Savings & Loan and by an obligation of approximately \$2,000 in favor of Land Funding, Inc., the party from which Development Associates was purchasing the property (R. 66-68). As Management Services paid for each lot, Development Associates intended to transfer money to State Savings & Loan and to Land Funding, Inc., to satisfy the obligations owed those parties, and thereby to procure a release from those parties of each lot on a lot-by-lot basis. (R. 268.)

After Development Associates retook possession of the eight lots from Management Services, it began reselling them for its own account. The six lots later found by the trial court to have been wrongfully forfeited by Development Associates were resold to six different parties (R. 236-37).

## ARGUMENT

### I.

#### NO REASON JUSTIFYING A REHEARING HAS BEEN ALLEGED.

Many years ago, this Court settled the standards governing the granting of a rehearing in Venard v. Old Hickory M. & S. Company, 4 Utah 67, 7 P. 408, 409 (1885), as follows:

To justify a rehearing, a strong case must be made. We must be convinced, either that the court failed to duly consider some material point in the case, or that it erred in its conclusions, or that some matter has been discovered which was unknown at the time.

The present petition for rehearing makes no allegation of the discovery of new material. Nor does the petition allege that this Court failed to consider some material point in the case. That leaves, as the only available ground for granting the rehearing, and the only one urged by Development Associates, that this Court erred in its conclusions. Where only this ground is urged for granting the rehearing, this Court has traditionally and justifiably been loath to comply. People v. Rogerson, 4 Utah 231, 7 P. 411 (1885); In re MacKnight, 4 Utah 237, 9 P. 299 (1886); Brown v. Pickard, 4 Utah 292, 11 P. 512 (1886); Bacon v. Raybould, 4 Utah 357, 11 P. 510 (1886). More recently, this Court took pains to elaborate on the rationale for this approach. After noting that an application for a rehearing is a matter of right not to be discouraged in proper cases, it was said in Cummings v. Nielson, 42 Utah 157, 129 P. 619, at 624 (1913) that:

When this court, however, has considered and decided all of the material questions involved in a case, a rehearing should not be applied for unless we have misconstrued or overlooked some material fact or facts, or have overlooked some statute or decision which may affect the result, or that we have based the decision on some wrong principle of law or have either misapplied or overlooked something which materially affects the result. In this case, nothing was done or attempted by counsel, except to reargue the very propositions we have fully considered and decided. If we should write opinions on all the petitions for rehearings filed, we should have to devote a very large portion of our time in answering counsel's contentions a second time; and if we should grant rehearings because they are demanded, we should do nothing else save to write and rewrite opinions in a few cases. Let it again be said that it is conceded, as a matter of course, that we cannot convince losing counsel that their contention should not prevail, but

in making this concession let it also be remembered that we, and not counsel, must ultimately assume all responsibility with respect to whether our conclusions are sound or unsound. . . . As a general rule, therefore, merely to reargue the grounds originally presented can be of little, if any, aid to us.

Finding no merit in the petition presented in Cummings, the petition was denied. The same considerations govern the instant petition for rehearing and it also should be denied.

## II.

THIS COURT DID NOT ERR IN UPHOLDING  
THE TRIAL COURT'S DETERMINATION THAT  
THE CONTRACT WAS AMBIGUOUS ON  
THE ISSUE OF SEVERABILITY.

The brief in support of the petition for rehearing challenges the finding that the Contract was ambiguous on the issue of severability and therefore urges that it was error for the trial court to admit parole evidence thereon. The only support for this assertion of error is a pair of quotations from the dissenting opinion which undoubtedly were considered by this Court in arriving at its prior decision upholding the finding of the trial court that the Contract was ambiguous on the severability issue. Nothing new is offered by Development Associates for its position.

With all due respect, the approach of the dissenting opinion, which approach is adopted by Development Associates, errs in that it focuses almost exclusively on the printed provisions of the form contract which might be read to support the argument against severability while ignoring the

typewritten language in the Contract which points in favor of severability. See Record at 9-10. This approach is faulty in two respects. In exalting printed over typewritten language, it contravenes the holding of this Court that where a printed form of contract is used, language supplied by the parties in writing or otherwise is to take precedence over the printed matter. Bank of Ephraim v. Davis, 559 P.2d 538, 540 (Utah 1977). Language supplied by the parties included the telling piece stating (R. 9):

Beginning March 1, 1977, buyer to complete payment on two (2) lots (\$19,800.00) and thereafter to close two (2) lots on the first of each month. Total amount to be paid on or before June 15, 1977.

Secondly, the dissent's approach trespasses against the principle that an ambiguous document is to be "strictly construed against him who draws it." Maw v. Noble, 10 Utah 2d 440, 354 P.2d 121, 123 (1960). The fact that a form contract was used in the instant case does not militate otherwise where, as here, the use of that form was suggested by Development Associates which also prepared the contract by filling in the blanks.

The dissenting opinion's construction of the printed provisions of the Contract as requiring all lots to be taken or none at all is not as inexorable as the dissenters appear to view it. First, the dissent assumes that it is contrary to any theory of severability for the buyer to take possession of all eight lots specified in the Contract on the date of the Contract's execution. Management Services submits that when read in the abstract, such a provision is quite neutral on the

issue of severability. When, however, it is realized that the provision was apparently intended to allow Management Services to bring prospective buyers on the lots to secure commitments for resale of those lots, the provision may be seen as tipping the balance, if any direction, in favor of severability.

The dissent next argues that inasmuch as eight lots were specified in the Contract of Sale, "it was not intended that the buyer be permitted to accept certain lots and reject others." Dissenting Opinion at 9. This is a "straw man" argument with no force. A contract is virtually never entered into by any party, and certainly not here, with the intention that it will be breached. Indeed, the response of Management Services to the notice of contract forfeiture served on it by Development Associates indicated that Management Services fully intended to pay for and take title to each of the lots named in the Contract. See Record at 13. Management Services did not foresee that its delayed action with respect to the March payment while it sought security for the completion of the improvements to the lots would be deemed a breach of the Contract and a forfeiture of the right to two or any other number of the eight lots. However, as noted more fully in part III of this brief, the intention to purchase each of the lots offered for sale does not answer the only relevant question, which is whether Development Associates would have been willing to sell, and whether Management Services would have been willing to buy, less than eight lots. It is submitted that both parties would have agreed to such a sale. Moreover, the

issue of severability typically arises only after, for whatever reason, it is no longer possible for the whole original Contract to be entirely satisfied. What was contracted for is not dispositive of what smaller quantity might instead have been agreed upon.

The dissent's reliance on the printed remedial provisions of the Uniform Real Estate Contract is also misplaced. Paragraph 16(c) which allows the seller the right to sue for the entire unpaid balance of the contract when the buyer fails to make a payment within a specified period after the due date, provides a harsh remedy to the seller to compensate him for the risk he bears in selling his property on time and for installments instead of for a lump sum cash payment up front. As such, it was almost surely drafted with a single parcel in mind to be paid for in several installments. To infer from this printed provision that the Contract is not severable, where the form was used instead for the sale of eight distinct lots to be closed separately upon the payment of a single sum for each lot, is clearly inappropriate. For the same reasons, recourse to the repossession option provided in Paragraph 16(a) is also neutral on the issue of severability under the circumstances.

Finally, the willingness of Development Associates to allow Management Services to choose the two lots to which it takes title in any given month, which procedure is the best suited method of securing the resale of these lots, is entirely consonant with the majority's holding that the lots were

considered "fungible" and undercuts the argument of the dissenting opinion that this contractual arrangement requires as a matter of law that the contract be interpreted as entire.

Accordingly, as the Contract was ambiguous on its face as to whether the parties intended that the sale of each lot, or each pair of lots, was severable, this Court properly upheld the action of the district court in considering extraneous evidence of the parties' intentions in this matter.

### III.

THIS COURT DID NOT ERR IN HOLDING  
THAT THE DISTRICT COURT HAD A RATIONAL BASIS  
FOR CONCLUDING THAT THE CONTRACT WAS  
INTENDED TO BE SEVERABLE AND NOT ENTIRE.

Development Associates asserts that there was no rational basis for the district court's conclusion that the Contract was severable (1) because allegedly no evidence was introduced on the issue of severability at the trial of this action, and (2) because "Management Services intended to and did in fact enter into a contract to purchase eight lots in the Daybreak Phase III Subdivision." Brief of Development Associates in Support of Petition for Rehearing at 7. Management Services submits that evidence bearing on the issue of severability was introduced at the trial of this matter. To quote the majority opinion at page 3:

The testimony at trial showed that plaintiff is a corporation organized for the purpose of buying and

selling property, and that its president, Edward A. White, is a real estate broker. Plaintiff was purchasing the lots for resale . . . .

See Record at 125, 127, 136-37, 256. These facts bear on the severability issue because they indicate Development Associates entered into this transaction with Management Services merely as a way of quickly and efficiently marketing these individual lots. At the time the Contract was made, it was not known which lots would sell first or which would bring the highest eventual price. Obviously, Development Associates was simply interested in unloading as many of these properties as would be taken by the first buyer to offer a fair price. Management Services, as to the eight lots contracted for, was this buyer. Had Management Services only been willing to buy six lots initially, Development Associates would have had no objection to such a sale, for it later sold the six lots still in issue to six different buyers. From these facts, it is evident that Development Associates had no apparent reason to demand that the eight lots be sold as a single unit or not at all. As this criterion is the determining factor of whether the Contract was severable under the test of divisibility properly established by the majority opinion of this court, the district court's opinion, and that of this Court affirming it, should stand.

Coming to the second point of Development Associates, no answer to the severability question is provided by asserting that Management Services intended to purchase all eight lots offered by Development Associates and specified in the



Contract. As Management Services was confident it could resell each of the eight lots offered at a profit, it naturally agreed to purchase that many. But there was nothing magic in the number or location of these eight lots. Indeed, Development Associates has articulated no reason why it might have desired to sell all eight lots only as a single group. It has instead only offered strained arguments based on the bare language of the Contract and later documents.

What the test of severability requires, as has been shown, is a determination of "whether the purpose of the parties was to buy and sell the whole tract as a unit so that the parties would not have agreed on less than the whole, in which case the contract is entire; otherwise, it is severable." Majority Opinion at 2. Just because the parties intended to and did enter into a contract for the sale of eight lots does not mean that the parties would have refused to make a contract for any smaller number of lots. As the interest of Development Associates was only that of recovering its investment in these properties with a fair profit at the soonest point possible, it is quite clear it would have been willing to sell any number of lots Management Services was willing to buy. This conclusion is substantiated by the fact that Development Associates later sold the six lots as to which Management Services had not forfeited its interest to six different parties.

Thus it appears that the record and the inferences fairly drawn therefrom more than adequately support the trial court's decision that the parties intended the Contract to be severable.

## CONCLUSION

For the reasons given above, the majority of this Court properly affirmed the holding of the district court in this matter that the Contract was severable and that Development Associates wrongfully terminated the Contract as to the six lots for which payment was not due until April, May, and June of 1977. The award of damages to Management Services which suffered by this breach was proper. As no legitimate ground for reconsidering the prior decision of this Court in this matter has been presented, the petition for rehearing should be denied and this action should be remanded to the district court for a determination of the attorneys' fees to be awarded to Management Services for the effort expended in prevailing on the prior appeal and with respect to this petition for rehearing, pursuant to the earlier decision of this Court.

Respectfully submitted,

SENIOR & SENIOR

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Kent B. Scott

By: John K. Mangum  
John K. Mangum

Attorneys for Management Services,  
Plaintiff and Respondent.

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief of Respondent in Opposition to Appellant's Petition for Rehearing were served upon the Petitioner by mailing the same postage pre-paid to Steven H. Stewart, of STEWART, YOUNG, PAXTON & RUSSELL, 220 South 200 East, Suite 450, Salt Lake City, Utah 84111, this 21st day of October, 1980.

William H. Stewart